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No. 08-441

In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL SERVICES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

BETH A. TOWNSEND
TOWNSEND LAW OFFICE
939 Office Park Road
Suite 104
West Des Moines, IA 50265
(515) 276-2212

MICHAEL J. CARROLL
BABICH, GOLDMAN, CASHATT & RENZO, P.C.
100 Court Avenue, Suite 403
Des Moines, IA 50309
(515) 244-4300

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. INTRODUCTION

This Court granted certiorari to decide whether direct evidence is required to obtain a mixed motives instruction in a non-Title VII case. (Petition, i). Respondent devotes much of its merits brief to a different issue, urging this Court to overrule *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

This Court has repeatedly declined to address an issue of such importance when it is raised for the first time in respondent's merits brief. For example, in *Alabama v. Shelton*, 535 U.S. 654 (2002), the Court refused to entertain respondent's suggestion that the Court overrule its earlier decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979).

> We do not entertain this contention, for Shelton first raised it in his brief on the merits. "We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari, cf. this Court's Rule 15.2, thereby assuring adequate preparation time for those likely affected and wishing to participate."

535 U.S. at 661 n.3 (quoting *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 171 (1999)). In *South Central Bell* this Court declined on similar grounds to consider a suggestion that it overturn "our longstanding negative Commerce Clause doctrine," noting that it was the Court's "practice" not to entertain such arguments when they had not been raised in the brief in opposition. 526 U.S. at 171.

The considerations articulated in *Shelton* and *South Central Bell* apply with particular force in the instant case. Respondent's brief in opposition, far from suggesting that *Price Waterhouse* should be reconsidered, embraced both that decision and its application to ADEA cases.[1] Because respondent did not earlier indicate that it would challenge the holding in *Price Waterhouse*, the United States was deprived of an opportunity to address that important issue in its brief. A decision to overrule the decision in *Price Waterhouse* would affect not only the ADEA but also the large number of federal and state[2] laws that since 1989 have been construed to embody the allocation of the burden of proof set out in *Price Waterhouse*. The decision in *Price Waterhouse* should not be revisited without affording to parties affected by a potential change in the interpretation of those other laws – including the attorneys general of the states involved – an opportunity to make their views known to this Court.

II. DIRECT EVIDENCE IS NOT REQUIRED TO OBTAIN A MIXED MOTIVE INSTRUCTION

(1) Respondent relies largely on Justice O'Connor's 1989 concurring opinion in *Price Waterhouse* to support its proposal for a direct evidence requirement.

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[1] Br. Opp. 7, 8-17.

[2] See brief appendix.

This argument ignores the significance of this Court's subsequent 2003 decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

Desert Palace construed the amendments to Title VII contained in the 1991 Civil Rights Act. Those amendments, respondent properly notes, did not modify the ADEA. (R.Br. 49). But this Court's decision in *Desert Palace* did not rest exclusively on the language of the 1991 Act. It also set forth a more general principle of statutory construction – that the courts should not require any "heightened showing" in ordinary civil litigation unless Congress itself has imposed such a standard. 539 U.S. at 99. (Pet. Br. 21-22). The unanimous opinion endorsing this presumption in favor of the conventional rule for civil cases was joined both by Justice O'Connor and by the three members of the Court who had dissented in *Price Waterhouse*.

It is *Desert Palace* which thus establishes the principles of interpretation that governs the construction of the ADEA. Respondent correctly acknowledges that the ADEA itself has no language authorizing the use of any heightened evidentiary standard. (R.Br. 18). The absence of such language is dispositive. Whatever the implications of the various *Price Waterhouse* opinions might have been had the instant case arisen in 1989, they have been overtaken by subsequent judicial events. In the wake of the *Desert Palace* rule any heightened showing requirements must be based on specific statutory language; further exegesis of the treatment of direct evidence in the

Price Waterhouse opinions is thus of little significance.

Justice O'Connor's concurring opinion in *Price Waterhouse*, calling for use of a direct evidence requirement, does not constitute the holding of the Court. Respondent erroneously relies on the statement in *Marks v. United States*, 430 U.S. 188, 193 (1977), that when

> no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

But this statement in *Marks*, like the opinion it cited in *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart J, Powell J., and Stevens, J.), concerned the method for determining the holding of the Court in a case in which *five* members of the Court concurred in the judgment. But in *Price Waterhouse six* members of the Court concurred in the judgment. When, as in *Price Waterhouse*, five of the six members of the Court did agree on a standard – in that case a standard not requiring direct evidence – it is simply irrelevant whether a sixth member, who favored that requirement, also concurred in the judgment. (See U.S.Br. 22).

Even if Justice O'Connor's opinion is not controlling, respondent argues,

> *Price Waterhouse* nonetheless requires that an employee present *substantial* evidence of

> discriminatory intent for the burden to shift to the employer. *See supra* at 29-30.

(R.Br. 42) (Emphasis in original). Pages 29-30 of respondent's brief quote from the separate concurring opinions of Justice O'Connor and Justice White, both of whom required the plaintiff to show that an unlawful purpose was "a substantial factor in the" disputed employment action. See 490 U.S. at 259 (White, J., concurring[3]), 278 (O'Connor, J., concurring). But there is a manifest difference between "substantial evidence" and "substantial factor." "Substantial evidence" refers to the weight of the evidence offered to establish a given fact, as compared to conclusive evidence or a mere scintilla of evidence. "Substantial factor" refers to the importance of a consideration in the decisionmaker's decision, as compared to an overwhelming or trivial factor. A plaintiff might establish by a preponderance of the evidence that age was a substantial factor, or show by overwhelming evidence that age was a very minor factor.

Respondent asserts that the plurality in *Price Waterhouse* "did not provide any particulars about when the evidence would be sufficient to use the mixed motive burden-shifting analysis." (R.Br. 28

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[3] Justice White's concurring opinion cannot be read as treating "substantial factor" as different (or more stringent than) "a motivating factor"; he regarded the two phrases as synonymous. 490 U.S. at 259 (" 'substantial factor' – or, to put it in other words, ... a 'motivating factor' ") (quoting *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977)).

n.20). That is not correct; the plurality specifically rejected the suggestion by Price Waterhouse that direct evidence should be required (490 U.S. at 257), and emphasized that there was no "limitation on the possible ways of proving that [gender] played a motivating role in an employment decision." 490 U.S. at 251-52 (quoted in *Desert Palace*, 539 U.S. at 92). Respondent describes the plurality as indicating that "its standard was not significantly different than Justice O'Connor's." (R.Br. 28 n.20 (citing 490 U.S. at 250 n.13)). That statement is correct only in a sense not relevant to the instant case. Footnote 13 of the plurality opinion, which respondent cites, refers to the plurality's standard regarding *what* a plaintiff must prove (that an unlawful purpose was one of the defendant's reasons) not to the plurality's standard as *how* that showing could be made (by non-direct as well as direct evidence).

Respondent repeatedly suggests that direct evidence must be required because the only alternative would be to compel an employer to show that it would have taken the action in question for non-discriminatory reasons in any case in which the plaintiff merely established a prima facie case. (R.Br. 40, 51, 53). Respondent insists the brief for petitioner urges, "in essence," that a mere prima facie case would have such effect. (R.Br. 40). We do not advance that position in essence, or in any other sense. The very first words in the argument in our opening brief were precisely to the contrary: "[i]n a disparate treatment case under the ADEA the plaintiff must *establish* that age was a motivating factor in the

employment decision at issue." (Pet. Br. 14 (emphasis added); see Pet. Br. 43 (burden is on employer only "where a plaintiff establishes that an impermissible purpose was a motivating factor in an adverse decision)). The jury instructions made clear to the jury that the plaintiff was required to prove "by the preponderance of the evidence ... [that] the plaintiff's age was a motivating factor in defendant's decision to demote plaintiff." (J.App. 9-10).

Importing a direct evidence requirement into the ADEA would significantly complicate the litigation of discrimination claims, because two quite different causation instructions might be necessary in a case involving claims under both the ADEA and some other law or constitutional provision. A Title VII claim is clearly governed by the *Price Waterhouse* burden allocation, now codified (with some modification) in the 1991 Civil Rights Act, and the decision in *Desert Palace* makes clear that direct evidence is not required under Title VII to meet the plaintiff's burden of showing that an impermissible motive was a motivating factor. Constitutional claims, including claims of unconstitutional discrimination in employment by state and local government bodies, are governed by the same allocation of burdens, which derive from this Court's decision in *Mt. Healthy City School District Bd. of Education v. Doyle*, 429 U.S. 274, 286 (1977). Respondent does not challenge the decision in *Mt. Healthy*, which contains no direct evidence requirement. (R.Br. 38 n.28.) It is common for a single action to combine claims under the ADEA with claims under Title VII or with constitutional

claims. In such a case, if the ADEA (unlike Title VII or constitutional claims) required direct evidence,

> the trial judge would face the challenge of trying to make lay jurors understand that "because of" means one thing as applied to the first claim and another thing as applied to the other claims. It is doubtful that Congress would want such a result, and we are reluctant to put trial judges in this predicament.

Watson v. Southeastern Pennsylvania Transp. Authority, 207 F.3d 207, 220 (3d Cir. 2000) (opinion by then Judge Alito).

(2) It is not entirely clear which heightened proof requirement respondent is asking this Court to adopt.

Respondent sets out a variety of heightened standards: "direct evidence,"[4] "substantial evidence,"[5] "substantial showing,"[6] "direct *or* substantial evidence,"[7] "direct *and* substantial evidence,"[8] and "[p]ut differently, ... evidence that would allow the factfinder to conclude that discrimination was the proximate cause of the employer's action."[9] These standards are different in kind; "direct evidence" refers to a particular

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[4] R.Br. 14, 15, 29-30; see R.Br. 43, 44, 45, 47, 49, 53.

[5] R.Br. 42.

[6] R.Br. 14, 40.

[7] R.Br. 1, 2, 16, 27, 46, 55 (emphasis added).

[8] R.Br. 2, 42, 45 (emphasis added).

[9] R.Br. 17.

kind of evidence, while "substantial evidence" refers to the degree of probativeness of the evidence.

"Substantial evidence" itself is a phrase of many meanings. Congress has used that phrase in literally hundreds of statutes, although not – of course – in the ADEA itself.[10] As used by respondent, "substantial evidence" has a particularly demanding meaning, because respondent explains that it can be satisfied only in "extraordinary" cases and circumstances. (R.Br. 41, 43; see R.Br. 44-45 n.31 (requisite evidence must be "a 'smoking gun' or at least a 'thick cloud of smoke'") (quoting *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997))). On that interpretation, "substantial evidence" would be more stringent than the requirement of proof beyond a reasonable doubt, because guilt beyond a reasonable doubt is routinely found in a large number of ordinary criminal cases. Under respondent's "extraordinary" circumstances standard, it apparently would be harder to get a mixed motive instruction than to convict a defendant of capital murder.

The meaning of the "direct evidence" standard is both elusive and malleable. In the court of appeals respondent represented that direct evidence means non-circumstantial evidence. "Where there is only circumstantial evidence of age discrimination, a mixed motive instruction incorrectly states the law."

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[10] A Westlaw search for "substantial evidence" in the United States Code identifies more than 1700 provisions.

(Appellant's Brief, 32; see *id*. at 30). In this Court, on the other hand, respondent asserts that under its proposed test "direct evidence" would include certain forms of circumstantial evidence. (R.Br. 17, 43, 46).

Then again, in arguing that the evidence in the instant case did not itself constitute direct evidence, the brief for respondent relies entirely on statements in the district court that the plaintiff had only circumstantial evidence. Respondent states that "the district court recognized that Gross did not present ... direct evidence" (R.Br. 53), quoting the following statement by the district judge:

> [I]n the absence of any direct evidence of discrimination, the jury had to rely on circumstantial evidence and inferences of discrimination to conclude that defendant discriminated against plaintiff based on his age.

(R.Br. 53 n.37). As used by the district judge in this passage, however, "direct evidence" clearly meant non-circumstantial evidence. Respondent asserts that "Gross's counsel acknowledged there was no direct evidence of age discrimination, *by any definition*." (R.Br. 52 n.35) (emphasis added). But the statements quoted by respondent in fact acknowledged only that there was no "admission by one person that said, oh, yeah, I heard Andy say Jack is too old." (Tr. 741). "You don't have to have the admission" (tr. 746); "[y]ou look at the circumstances." (Tr. 740). This constitutes an acknowledgement of a lack of direct evidence *only* if direct evidence is defined to mean non-circumstantial evidence. Respondent states that "counsel conceded

the absence of direct evidence." (R.Br. 53). But the "concession" to which respondent refers is as follows:

> [W]e don't have anything in this case that says we've got to get rid of Gross because of his age or we've got to demote Gross because of his age or Jack [Gross] is old and over the hill and give that position to [the younger worker], it isn't there.
>
> But *if that's what direct evidence is*, then we don't need it, and there's plenty of this record that's circumstantial to support the conclusion and the inference that age was a basis, age was a motivating factor....

(Appellant's App. 596) (emphasis added). In short, the district court found and petitioner conceded that there was no "direct evidence" only on a meaning of "direct evidence" – non-circumstantial evidence – which respondent in this Court expressly disavows.

"Direct evidence," respondent explains, is evidence that "relates directly" to the allegedly discriminatory action. But much of the evidence in the instant case does relate directly to the disputed demotion – proof that the explanations for Gross's demotion were untrue, proof that Gross's job was given to an unqualified younger worker, and proof that the contemporaneous pattern of demotions and promotions favored younger workers over older employees. Respondent does not offer a definition of "direct evidence" sufficiently specific to predictably distinguish among the wide variety of types of evidence that might be offered to demonstrate the existence of an unlawful purpose.

In one passage respondent asserts that a "plaintiff must *show* by direct evidence that an illegitimate criterion was a substantial factor in the decision." (R.Br. 41-42) (quoting *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring)) (emphasis added). In a case tried to a jury, the issue of whether the plaintiff had "show[n] ... that an illegitimate criterion was a substantial factor in the decision" would be decided by the jury, not the trial judge. Thus on this articulation of respondent's proposed standard, a mixed motive instruction would be proper only if (and after) the trier of fact found, upon considering the direct evidence alone, "that an illegitimate criterion was a substantial factor in the decision." In a jury trial that would require a fairly complicated set of instructions. The jury would be directed to decide, first, if the direct evidence (identified by the court as such) was sufficient by itself to show by a preponderance of the evidence that an impermissible consideration was a motivating factor. If the jury so found, the burden would be on the defendant to prove it would have made the same decision in the absence of discrimination. If, on the other hand, the jury concluded that the direct evidence alone did not suffice, it would be directed to next consider the rest of the plaintiff's evidence and decide whether all the evidence demonstrated the existence of such an unlawful purpose; if so, the burden would be on the plaintiff to prove the employer would not have made the same decision in the absence of discrimination.

Elsewhere in its brief, on the other hand, respondent states that the plaintiff need only "present" or "produce" the requisite evidence.[11] On that view, so long as the plaintiff possessed and could offer at trial the required type of evidence, it would not matter whether the trier of fact ultimately relied on or even believed that evidence. For example, if proffered testimony that a decisionmaker had said "Demote Gross, he is too old for his job" constituted direct evidence, then a mixed motive instruction would be proper, regardless of whether at trial the jury paid no attention to the evidence (because other evidence seemed more important), found contrary evidence more persuasive (because other witnesses denied hearing the asserted remark), or dismissed that direct evidence as wholly incredible (because, for example, the witness was in jail on the date of the asserted statement). See *Okors v. Angelo Iafate Const. Co.*, 298 Fed.Appx. 419 (6th Cir. 2008) (direct evidence conclusively refuted by telephone records).

It would, of course, be possible to fashion any number of heightened proof standards that would be reasonably clear. For example, "direct evidence" could be defined to mean (and be limited to) proof of a biased remark made by a decisionmaker within 48 hours (or 30 days or one year) of the disputed adverse action, or a sworn (or videotaped) admission of unlawful purpose, or to embody a two witness rule like the

[11] R.Br. 2, 42.

Treason Clause of Article III, section 3. Or "substantial evidence" might be defined to demand proof beyond a reasonable doubt, or proof by clear and convincing evidence.

But in the absence of any statutory language mandating some specific standard, there would be no principled basis on which the courts themselves could select from among these or countless other conceivable heightened evidentiary standards. Respondent's failure to choose among the many heightened proof standards that it hypothesizes may reflect the difficulty respondent would face in explaining why it had selected any particular standard from among all the imaginable alternatives.

(3) The fashioning of a direct evidence standard faces another intensely practical problem. It assuredly would make no sense to define the required direct evidence in a way that included evidence which was *less* probative than the non-direct evidence (however defined) on which the plaintiff could not rely. Respondent itself expresses concern that a mixed motive instruction not be based on insufficiently probative evidence.

Yet it would be difficult to define a particular kind of evidence as "direct" without encompassing within that definition some evidence that would be far from probative. For example, at least most of the alternative definitions of direct evidence would include testimony that the official who demoted Gross stated at the time, "I demoted Gross because of his

age." Yet that definition of direct evidence would include such testimony from a thrice convicted perjurer, with a well-known grudge against the employer, that was contradicted by a roomful of wholly disinterested witnesses. Under the Eighth Circuit's particular definition of direct evidence, testimony about a biased remark by the decisionmaker uttered a month before the demotion would be direct evidence, even if the testimony was highly unreliable, but evidence that the decisionmaker had made such a remark four months earlier would not be direct evidence, even if there were a video recording of the statement. (See Pet. Br. 38 and n.44).

In all events, the very effort of fashioning a per se rule as to what constitutes direct evidence would be inconsistent with this Court's recent decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008). In *Sprint* the plaintiff asserted that the district court had applied a per se rule which barred admission, inter alia, of all discriminatory remarks made by company officials other than her own supervisors. 128 S.Ct. at 1143. Although this Court remanded the case for clarification as to the basis for the district court's order, the Court explicitly held that the utilization of any such per se rule would be improper.

> [H]ad the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance ... under Rule[ ] 401 ... [is] determined in the context

> of the facts and arguments in a particular case, and thus [is] generally not amenable to broad *per se* rules.

128 S.Ct. at 1147. The Eighth Circuit's direct evidence standard in the instant case, which bars reliance on "statements by nondecisionmakers,"[12] is essentially the same per se rule which this Court disapproved in *Sprint*.

Sprint, of course, concerned the admissibility of evidence under Rule 401 of the Federal Rules of Evidence, whereas the instant case deals with the type of evidence needed to obtain a mixed motive instruction. But the underlying problem is essentially the same: no per se rule could take into account the plethora of factors that might bear on the probativeness of a particular kind of evidence. The Federal Rules of Evidence entrust to the trial judge, acting in light of all the particular circumstances of a case, discretion in determining whether "a reasonable person acting as trier [of fact] could assign some weight to evidence." 1 C. Mueller & L. Kirkpatrick, *Federal Evidence*, § 4:1 (2d ed. 2008). Under longstanding federal practice, deeply rooted in the Seventh Amendment, federal judges do not ordinarily undertake to assess the weight of admissible evidence.[13]

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[12] Pet. App. 5a (quoting *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring in judgment)).

[13] The one notable exception is that a trial judge may order a new trial because the verdict is against the great weight of the evidence.

The adoption by the appellate courts of per se rules regarding the sufficiency of certain types of evidence – whether to support a particular jury instruction, to defeat summary judgment, or to support a verdict – would improperly intrude on the respective roles of trial judges and of juries in admitting and evaluating evidence.

III. *PRICE WATERHOUSE* SHOULD NOT BE OVERRULED

Price Waterhouse was an interpretation of Title VII as that statute stood in 1989. In the 1991 Civil Rights Act, Congress amended Title VII to address expressly the resolution of a mixed motive case. Respondent asks this Court to overrule *Price Waterhouse*'s 1989 construction of "the text of Title VII in effect at the time" (R.Br. 32), and then to apply this new interpretation of the pre-1991 version of Title VII to the ADEA. Revisiting the interpretation of a statute long superseded by congressional action (Title VII) seems a somewhat roundabout method of construing another law (the ADEA). The principle of stare decisis is nonetheless controlling here.

"Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Paterson v. McLean Credit Union*, 461 U.S. 164, 172-73 (1989). The principle of stare decisis weighs heavily

against revisiting an interpretation of a statute which Congress has not itself overturned. In this instance, rather than merely tacitly acquiescing in the holding in *Price Waterhouse*, Congress affirmatively embraced that decision. Within two years of *Price Waterhouse*, Congress enacted legislation that largely codified the plurality opinion, modifying it only to strengthen[14] the protection against discrimination provided by that decision. Like the *Price Waterhouse* plurality, the 1991 amendments specify that a plaintiff need only show that "race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). Where a plaintiff has made such a showing, the burden (as in *Price Waterhouse*) is on the defendant to prove that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B). Respondent thus errs in suggesting that the 1991 Act undermined the vitality of *Price Waterhouse* because it "statutorily overruled *Price Waterhouse*" (R.Br. 15) and "expressly returned the burden of persuasion to the employee on all elements of Title VII claims." (R.Br. 37).

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[14] Under *Price Waterhouse* a showing that the employer would have taken the same action in the absence of discrimination precludes a finding of liability. 490 U.S. at 242 (plurality opinion). Under the 1991 Act such a showing only limits the remedies. 42 U.S.C. § 2000e-5(g)(2)(B).

These 1991 amendments applied only to section 703 of Title VII, the specific statute construed by *Price Waterhouse*. But Congress would undoubtedly have anticipated that the principles of *Price Waterhouse* would be applied by the courts to other federal anti-discrimination laws, which often are construed in light of the interpretation of Title VII. By the time the 1991 Act was adopted, the lower courts had applied *Price Waterhouse* to a number of other federal civil rights laws, including the ADEA, albeit with emerging differences about whether or not direct evidence was required. That still unresolved dispute aside, respondent fairly describes Congress's action in 1991 – deliberately choosing not to overturn that decision – as "a ratification of the application of *Price Waterhouse* to the ADEA." (R.Br. 50 n.34.)

Since 1989 the holding of *Price Waterhouse* has become deeply embedded in American law. The courts of appeals have unanimously and repeatedly agreed that *Price Waterhouse* applies to claims under the ADEA. (R.Br. 50 n.34; U.S. Br. 11 n.2). In the wake of *Price Waterhouse*, Congress has enacted a series of new anti-discrimination and anti-retaliation statutes,[15] presumably aware of and intending that the

[15] The most important of these statutes, in addition to the Americans With Disabilities Act, are the Genetic Information Nondiscrimination Act of 2008 (122 Stat. 881), the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (116 Stat. 566), the Sarbanes-Oxley Act (116 Stat. 745), the Religious Land Use and Institutionalized Persons Act of 2000 (114 Stat. 803), the Presidential and Executive Office

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principles of *Price Waterhouse* would apply to this legislation. For example, section 102(a) of the Americans With Disabilities Act, in language similar to section 703 of Title VII, provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112(a). It would materially impede the ability of Congress to legislate against a background of settled legal principles if this Court were to now overturn *Price Waterhouse* and retroactively apply to legislation adopted since 1989 a new interpretation of pre-1991 Title VII. In addition, since 1989 state courts in twenty-eight states, expressly relying on *Price Waterhouse*, have construed state statutes to embody the mixed motive approach contained in this Court's decision.[16] A decision by this Court overturning *Price Waterhouse* would force courts in these states to reexamine this issue, introducing considerable uncertainty and instability into state law. Over the last twenty years the lower federal courts have applied *Price Waterhouse* to numerous federal statutes; were *Price Waterhouse* now overturned, this entire body of judicial precedent would have to be reconsidered.

Respondent contends that the *Price Waterhouse* allocation of burdens has proved "unworkable" (R.Br. 1, 15). But respondent does not explain why it would

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Accountability Act (110 Stat. 4053), the Congressional Accountability Act (109 Stat. 3), and the Family and Medical Leave Act (107 Stat. 6).

[16] See brief appendix.

be difficult to frame a workable jury instruction implementing the allocation of burdens in *Price Waterhouse*. The jury instructions in the instant case are perfectly clear. Regardless of any supposed difficulties, jury instructions embodying such an allocation are emphatically required by the 1991 amendments to Title VII, and thus already apply to the Title VII claims that are at least a plurality of federal employment discrimination cases. The instructions and procedures utilized for Title VII claims would function as easily in ADEA cases.

Respondent asserts that "courts have found *Price Waterhouse* hard to implement in the jury trial context." (R.Br. 33). But the materials cited in respondent's brief do not support that contention. Most of the authorities relied on by respondent actually object only to the lack of any clear and manageable definition of "direct evidence." One article cited by respondent labels Justice O'Connor's concurrence "practically unworkable" because it "failed to provide a clear distinction between the two types of evidence ... direct or circumstantial."[17] *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176 (2d Cir. 1992), solved that problem by rejecting any direct evidence requirement, and approving a jury instruction essentially identical to the instruction in the instant case. 958 F.2d at 1179-80, 1187. The only "confusion" at issue in *Ostroski v.*

[17] J. Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am.Bus.L.J. 531, 533 (2008).

Atlantic Mutual Insurance Co., 968 F.2d 171, 186 (2d Cir. 1991), concerned the error of the trial judge who mistakenly assumed that he, not the jury, was to decide whether the plaintiff had shown that an unlawful purpose was a motivating factor. 968 F.2d at 186.

Respondent contends that *Price Waterhouse* was wrongly decided. But its arguments add little new to the four exhaustive opinions fully airing these issues in *Price Waterhouse* itself.

Respondent asserts that under the conventional rule in civil cases a plaintiff is always required to show that the defendant's action was the but-for cause of the plaintiff's injury, that the injury would not have occurred in the absence of the defendant's action. That is not correct. In tort when the injury complained of was the result of two independent actions, each sufficient by itself to cause the injury, neither action would be a "but-for" cause; yet the party responsible for either action would be held liable. Thus if two motorcycles simultaneously pass the plaintiff's horse, which is frightened and runs away, and either vehicle alone would have caused the fright, either motorcyclist may be held liable. In these cases an action sufficient by itself to cause the injury is characterized as a "substantial factor"; where such a factor is shown, there is no affirmative defense.[18]

[18] W. Page Keeton, ed., *Prosser and Keeton on the Law of Torts*, 266 (5th ed. 1984); *Restatement (Second) of Torts*, § 432(2);

(Continued on following page)

Compared to this conventional tort rule, the standard in *Price Waterhouse* and *Mt. Healthy* is more favorable to defendants, because those decisions permit a defendant to avoid liability by showing that it would have taken the same action in the absence of the proven impermissible purpose.

Respondent asserts that in conventional litigation a defendant never bears the burden of proof with regard to causation. That is not correct. Where an injury was caused by either (but not both) of two actions, the injured party may sue either actor, and the defendant bears the burden of showing that its own action was not the cause.[19] That burden allocation applies, for example, if two hunters negligently fire in the direction of the plaintiff, who is hit by only a single bullet.

Respondent suggests that some provisions in the ADEA contain "particular language" placing the burden of proof on the employer with regard to certain affirmative defenses. (R.Br. 25). These asserted express provisions, it reasons, "make[ ] plain that when Congress wished to place the burden of proof on employers under the ADEA, it knew how to do so explicitly." *Ibid.* But there is no such explicit

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F. Harper, F. James and O. Gray, *Harper, James and Gray on Torts*, § 20.3, pp. 139-41 (3d ed. 2007); D. Dobbs, *The Law of Torts*, § 171, pp. 415-16 (2000).

[19] *Prosser and Keeton on Torts*, § 41 p. 271; *The Law of Torts* § 175, pp. 426-27; *Harper, James and Gray on Torts*, § 20.2, p. 123; *Restatement (Second) of Torts*, § 433B(2).

language in the ADEA. The provisions to which respondent refers contain no reference whatever to the allocation of the burden of proof, and are not even labeled "affirmative defenses" by the ADEA. 29 U.S.C. § 623(f). Both the allocation of that burden, and that characterization, are matters of judicial interpretation. The existence of many of those same affirmative defenses in Title VII[20] did not preclude this Court from framing an affirmative defense, on which the employer bears the burden of proof, in *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998), as well as in *Price Waterhouse*.

Price Waterhouse is entirely consistent with *McDonnell Douglas Corp. v. Green*, 427 U.S. 273 (1976), because the two decisions address distinct issues. *McDonnell Douglas* emphatically is not, as respondent asserts, "a framework for determining causation." (R.Br. 23). Rather, *McDonnell Douglas* is *a* method of proving that an impermissible criterion was a motivating factor (perhaps the sole motive, perhaps one of several) behind a disputed employment action. *Price Waterhouse*, on the other hand, is a method for allocating the burden of proof if the trier of fact has concluded that there were several motivating factors at work, one of which was unlawful. It will

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[20] *Compare* 29 U.S.C. § 623(f)(2)(A) (bona fide seniority system) *with* 42 U.S.C. § 2000e-2(h) (same); *compare* 29 U.S.C. § 623(f)(1) (bona fide occupational qualification) *with* 42 U.S.C. § 2000e-2(e) (same); *compare* 29 U.S.C. § 623(f)(1) (compliance with foreign law) *with* 42 U.S.C. § 2000e-1(b) (same).

rarely if ever be possible to foresee prior to the conclusion of the trial whether the trier of fact – if it finds the existence of an unlawful motive – will conclude that the illicit purpose was the sole motive, or only one of several. Until the jury verdict, or the findings of the court after a bench trial, are known, whether a case involves mixed motives is simply unknowable.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000), and *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), this Court stated that a disparate treatment claim under the ADEA cannot succeed unless "the employee's protected trait actually played a role in the process and had a determinative influence on the outcome." These decisions cannot be read, as respondent suggests, to overrule *Price Waterhouse sub silentio* or to hold – despite the unanimous views of the lower courts to the contrary – that *Price Waterhouse* has no application to the ADEA. The question of causation simply was not in dispute in these cases, and neither decision indicates which party has the burden of proof on what issue. As the plurality explained in *Price Waterhouse*, where a party "has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that the assertion is inaccurate." 490 U.S. at 246 n.11. Thus the law concludes that age was the determining factor if – as the jury found to be the case here – an employer is unable to meet its burden under *Price Waterhouse*.

IV. RESPONDENT CAN ADVANCE ON REMAND ITS CONTENTION THAT THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT AGE WAS A MOTIVATING FACTOR

In the proceedings below, respondent argued that it was entitled to judgment as a matter of law because no reasonable jury could have found that age was a motivating factor in the demotion of petitioner. The district court rejected this argument, explaining that "there was ample circumstantial evidence presented during trial for the jury to conclude that FBL intentionally discriminated against Gross based on his age." (Pet. App. 25a). "There was ... sufficient evidence for the jury to reasonably conclude that FBL's explanation for demoting Gross was false and a pretext for discrimination." (Pet. App. 27a-28a). "[T]he jury had reasonable grounds to question the credibility of FBL's witnesses because of inconsistencies and contradictions in their testimony." (Pet. App. 29a). The court of appeals, however, did not reach this issue. (Pet. App. 14a).

In this Court respondent renews this challenge to the sufficiency of the evidence, insisting both that the record contains no evidence of discrimination[21] and that counsel for petitioner expressly conceded that

[21] R.Br. 7, 9, 27 n.18, 47, 56.

the record was fatally deficient.[22] Although we strongly take issue with respondent's characterizations of the record and of the statements of counsel, these are questions which should be dealt with in the first instance by the court of appeals on remand.

[22] R.Br. 9 n.9, 51.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be vacated and remanded for further consideration consistent with the decision of this Court.

Respectfully submitted,

BETH A. TOWNSEND
TOWNSEND LAW OFFICE
939 Office Park Road
Suite 104
West Des Moines, IA 50265
(515) 276-2212

MICHAEL J. CARROLL
BABICH, GOLDMAN, CASHATT
& RENZO, P.C.
100 Court Avenue, Suite 403
Des Moines, IA 50309
(515) 244-4300

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

**Counsel of Record*

Counsel for Petitioner

State Court Decisions Applying *Price Waterhouse* to State Law Claims

In each state the most recent decision in the jurisdiction is listed.

Alaska

Kinzel v. Discovery Drilling, Inc., 93 P.2d 427, 434 (Alaska 2004) (Alaska state law claim)

Arkansas

Crockett v. Counseling Services of Eastern Arkansas, Inc., 85 Ark.App. 371, 381 n.1, 154 S.W.2d 278, 284 n.1 (Ark. App. 2004) (Arkansas Civil Rights Act)

California

Mwaniki v. eBay, Inc., 2005 WL 2324401 at *6-*7 (Cal.App. 6 Dist. 2005) California Fair Employment and Housing Act)

Connecticut

Commission on Human Rights & Opportunities ex rel. Colon v. Sullivan, 2005 WL 2855540 at *3 (Conn. Super. 2005) (Connecticut housing law)

District of Columbia

Furline v. Morrison, 953 A.2d 344, 353 n.28 (D.C. Ct. App. 2008) (District of Columbia Human Rights Act)

Illinois

Chicago Housing Authority v. Human Rights Com'n, 325 Ill.App. 3d 1115, 1123, 759 N.E.2d 37, 45 (Ill. App. 1 Dist. 2001) (Illinois Human Rights Act)

Indiana

SSU Federation of Teachers v. Board of Directors, Madison Area Educational Special Services Unit, 656 N.E.2d 832, 835 (Ind. App. 1995) (Indiana state law claim)

Iowa

Plagmann v. Square D Co., 2004 WL 2809521 at *1 (Iowa App. 2004) (Iowa Civil Rights Act and the Cedar Rapids Municipal Code)

Kansas

Wagher v. Guy's Foods, Inc., 256 Kan. 300, 326, 885 P.2d 1197, 1214 (1994) (Kansas Act Against Discrimination)

Kentucky

Lovings v. Akzo Nobel Castings, Inc., 2003 WL 21991540 at *4 (Ky. App. 2003) (Kentucky Civil Rights Act)

Louisiana

Morgan v. New Orleans Public Facility Management, Inc., 703 So.2d 182, 184 (La. App. 4 Cir. 1997) (Louisiana state law claim)

Maryland

Gasper v. Ruffin Hotel Corp. of Maryland, Inc., 113 Md.App. 211, 220, 960 A.2d 1228, 1233 (Md. App. 2008) (Maryland Human Rights Act)

Massachusetts

Connolly v. Suffolk County Sheriff's Dept., 62 Mass.App.Ct. 187, 194, 815 N.E.2d 596, 603 (Mass. App. Ct. 2004) (Massachusetts anti-discrimination law)

Michigan

Goncalves v. Community Support and Treatment Services, 2006 WL 475282 at *1 (Mich. App. 2006) (Michigan Civil Rights Act)

Missouri

Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 819 n.6 (Mo. 2007) (Missouri Human Rights Act)

Montana

Laudert v. Richland County Sheriff's Dept., 301 Mont. 114, 120, 7 P.3d 386, 391 (2000) (Montana Human Rights Act)

New Hampshire

In re Hardy, 154 N.H. 805, 813, 917 A.2d 1237, 1244 (2007) (New Hampshire Whistleblowers Protection Act)

New Jersey

Myers v. AT&T Corp., 2009 WL 187589 at *4 (N.J. Super. A.D. 2009) (New Jersey Law Against Discrimination)

New York

Sogg v. American Airlines, Inc., 193 A.D.2d 153, 156 n.1, 603 N.Y.S.2d 21, 23 n.1 (N.Y.A.D. 1 Dept. 1993) (New York Human Rights Law)

New Mexico

Behrmann v. Phototron Corp., 110 N.M. 323, 325, 795 P.2d 1015, 1017 (1990) (New Mexico Human Rights Act)

North Carolina

Newberne v. Department of Crime Control and Public Safety, 359 N.C. 782, 790, 618 S.E.2d 201, 207 (2005) (North Carolina Whistleblower Act)

Ohio

Wittman v. City of Akron, 2003 WL 22399742 at *4 (Ohio App. 9 Dist. 2003) (Ohio state law retaliation claim)

Pennsylvania

Spanish Council of York, Inc. v. Pennsylvania Human Relations Com'n, 879 A.2d 391, 399 n.19 (Pa. Cmwlth. 2005) (Pennsylvania Human Relations Act)

Rhode Island

Brown University v. Rhode Island Com'n for Human Rights, 1997 WL 1051033 at *4 (R.I. Super. 1997) (Rhode Island state law claim)

Texas

Kennedy v. Texas Dept. of Protective and Regulatory Services, 2005 WL 3499442 at *3 (Tex. App. – Austin 2005) (Texas Labor Code)

Vermont

McIsaac v. University of Vermont, 177 Vt. 16, 31, 853 A.2d 77, 88 (2004) (Vermont state law claim)

Washington

Griffith v. Schnitzer Steel Industries, Inc., 128 Wash.App. 438, 447 n.4, 115 P.3d 1065, 1070 n.4 (Wash. App. Div. 2 2005) (Washington Law Against Discrimination)

West Virginia

Mayflower Vehicle Systems, Inc. v. Cheeks, 218 W.Va. 703, 714, 629 S.E.2d 762, 773 (2006) (West Virginia Human Rights Act)

Wisconsin

Hoell v. Labor and Industry Review Com'n, 186 Wis.2d 603, 608, 522 N.W.2d 234, 236 (Wis. App. 1994) (Wisconsin Fair Employment Act)